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COURT OF CRIMINAL APPEALS
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No. PD-1123-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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Ex parte Charles Barton, Appellant

Appeal from Tarrant County

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STATE'S REPLY BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State submits a short reply brief to address the dangers presented by appellant's insistence that this Court address overbreadth on the merits.

Appellant's best argument for preservation is that his bare statement that the statute is "overly broad and chills the protected speech of the First Amendment [and] is unconstitutional on its face"[1] put the trial court "on fair notice" of an overbreadth challenge. An overbreadth claimant must do far more than allude to the doctrine's existence; in context, it is doubtful he did even that. Appellant's argument that overbreadth was presented to the court of appeals is that the court of appeals said so.[2] A reading of his brief to that court shows that court is wrong. The court of appeals

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[1] App. Br. at 22.

[2] App. Br. at 22 (citing *Ex parte Barton*, 586 S.W.3d 573, 576-77 (Tex. App.—Fort Worth 2019, pet. granted) (on reh'g).

never performed a proper overbreadth analysis, either.[3] By any measure, this Court should hold that the court of appeals should not have reached overbreadth.

Not so, says appellant, because free speech is more important than "how well the game was played below."[4] What appellant refers to as "the game" is the professional obligations of lawyers and judges. They include the former's duty to advocate for their clients and the latter's (general) duty to rule only on issues presented to them. According to appellant, these obligations—and this Court's rules based upon them—*must* be ignored anytime a First Amendment issue finds its way onto this Court's docket so that *when* it decides the issue it will have the best arguments available to it.[5] Appellant openly asks this Court to ignore the rules of preservation and justiciability to reach a "last resort" facial challenge that ignores core concepts of justiciability.[6] This argument encapsulates everything that is wrong with this area of law.

Worse, the overbreadth argument he insists should be considered despite being presented here for the first time bears little resemblance to the proper standard for

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[3] *See* State's Br. at 14-15.

[4] App. Br. at 27.

[5] App. Br. at 24-27.

[6] *Broadrick v. Oklahoma*, 413 U.S. 601, 613-15 (1973).

overbreadth.[7] The only way for this Court to decide the statute is overbroad would be to craft an argument for appellant that at least facially complies with the law.[8] That would be an argument the State has not yet seen and that would inevitably contradict appellant's arguments in many respects. Will there be oral argument before that happens, or at least the opportunity for additional briefing? Or will the State have to fight the inertia of an issued opinion by filing a motion for rehearing?

The First Amendment is important. It is important enough to bend some of the rules in a handful of cases where a statute that can be lawfully applied to many or even most people will also do real harm to a relatively substantial number of innocent people. It is not important enough to ignore all the rules for presenting and considering arguments in criminal proceedings. And it should not be used by courts as a vehicle to create arguments for a defendant on the belief—"at best, a

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[7] Appellant says—with no basis other than his own flow chart—that the statute is overbroad simply because it "restricts a real and substantial amount of protected speech—that is, speech not in any recognized category of historically unprotected speech—based on its content." App. Br. at 21, 24. This model either fails to identify a legitimate sweep for comparison or erroneously assumes that only unprotected speech can be lawfully restricted. Moreover, his "content-based" argument was forfeited. *Ex parte Barton*, 586 S.W.3d at 576 n.5. Appellant now claims that "part of [an] overbreadth argument is necessarily that the statute is content based," App. Br. at 35, but that is not true; a statute can be overbroad because it unlawfully restricts a substantial amount of speech (relative to its plainly legitimate sweep) that deserves only intermediate scrutiny.

[8] This includes establishing the statute's legitimate sweep by identifying how much prohibited conduct is communicative, what level (or levels) of scrutiny that communicative conduct receives, and whether the statute satisfies the applicable standard(s), and then identifying concrete examples of speech that is unlawfully prohibited and determining whether they are substantial in relation to the statute's legitimate sweep.

prediction"[9]—that a substantial number of real people are choosing not to share an idea because they want to repeatedly intentionally harass others in a manner reasonably likely to harass.

Appellant says "it is a normal part of human life to annoy and embarrass and alarm each other, and sometimes to abuse, torment, and harass each other."[10] If by "normal" he means "common" or "natural," that is unfortunately true of any number of things that we, through our elected representatives, have made illegal. Texans, like any rational people, don't want to be repeatedly intentionally harassed by those who conduct themselves in a manner reasonably likely to harass. We made a statute to deter it that has a broad, plainly legitimate sweep. And while the will of the people and a multitude of lawful applications do not guarantee constitutionality, they should mean enough to prevent the abandonment of basic rules of review just to reach an overbreadth argument the Court will have to create nearly from scratch.

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[9] *Broadrick*, 413 U.S. at 615.

[10] App. Br. at 34.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm the trial court's denial of appellant's pretrial writ.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 942 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of January, 2020, the State's Reply Brief has been eFiled and electronically served on the following:

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